In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 446

LEONARD GAMAGE, PETITIONER

v.

HAROLD BROWN, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 3–10) is reported at 377 F. 2d 154. The memorandum opinion of the United States District Court for the District of Columbia (Pet. App. 1–2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1967, and a petition for rehearing was denied on May 23, 1967. The petition for a writ of certiorari was filed on August 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

275-110—67——1

QUESTION PRESENTED

Whether, in a proceeding before an Air Force Board of Inquiry to determine whether an officer should be retained on active duty or honorably retired with full retirement pay, the Board may receive written statements of persons who are not available to testify and whose depositions the officer does not attempt to obtain.

STATUTE AND REGULATION INVOLVED

Section 8792(b) of Title 10 of the United States Code (Pet. App. 11) provides:

> A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

Secton 18(c)(2) of Air Force Regulation 36–2 (Pet. App. 15) provides, in part:

> The use of affidavits or depositions to obtain testimony of witnesses who are not reasonably available is encouraged.

STATEMENT

Petitioner, a former Lieutenant Colonel in the Air Force, commenced this action by filing a complaint seeking to void respondent's decision to retire him from the active list of the Air Force honorably and with full retirement pay. In 1960, petitioner was relieved of his command of the Weather Detachment of the Military Air Transport Service at Mather Air Force Base, California, as a result of complaints that he had falsified official documents and was derelict in

his supervision of subordinate personnel (J.A. 112).[1] A Selection Board of general officers under 10 U.S.C. 8791 then recommended that he be required to show cause why he should be retained on active duty (J.A. 113–114). Pursuant to 10 U.S.C. 8792, a Board of Inquiry was convened to conduct a hearing on this issue. The Board of Inquiry found that petitioner's removal was justified; and this finding was affirmed by a Board of Review as provided for in 10 U.S.C. 8793 (J.A. 126, 127). Petitioner was then removed from the active list by the Secretary of the Air Force, under the authority granted by 10 U.S.C. 8794 (J.A. 128).

Several months prior to the hearing before the Board of Inquiry petitioner was informed of the charges against him and given his case file, which contained a summary of the evidence supporting those charges (J.A. 114–115). He was also given a list of the 48 persons whose names appeared in the file, along with their current addresses, for "assistance in contacting any potential witnesses for the purpose of obtaining depositions for the Board of Inquiry" (J.A. 116). Five of these persons had given affidavits adverse to petitioner's position, which affidavits were also contained in the case file (J.A. 119). Four of the affiants were no longer in military service; the fifth was stationed in England at the time of the hearing (J.A. 116).

Petitioner requested the Air Force to obtain the presence at the hearing of the four witnesses not then

[1] "J.A." references are to the joint appendix in the court of appeals.

in the service; the presence of the fifth witness was not requested (J.A. 118). The Air Force sent letters to each of the four witnesses asking them to appear at the hearing, but these requests were refused (J.A. 118–120). Petitioner was informed that the Air Force would not object to his use of depositions, affidavits, or sworn statements at the hearing (J.A. 118–119).

The hearing was transferred from Scott Air Force Base, Illinois, to Travis Air Force Base, California, at petitioner's request, and was postponed at least once when he requested extra time to take depositions and gather affidavits (J.A. 117). Petitioner did not attempt to depose any of the five adverse witnesses, and at no time was the Air Force requested to aid petitioner in obtaining depositions for use at the hearing (J.A. 118–120). At the hearing, the adverse affidavits were introduced over petitioner's objection, and eighteen witnesses gave live testimony (J.A. 119–120, 125). Prior to the conclusion of the hearing petitioner's counsel acknowledged that the Air Force "has done an excellent job, and has made a diligent effort * * * to procure the witnesses that * * * [petitioner] requested" (J.A. 125–126).

The Board of Inquiry found against the petitioner and the Board of Review affirmed (J.A. 126, 127). The Secretary then removed him from the active list (J.A. 128). The United States District Court for the District of Columbia granted petitioner's motion for summary judgment and declared the Secretary's action void. The court of appeals, in a unanimous opinion (Bazelon, C. J., and Edwards and Burger, JJ.), reversed.

ARGUMENT

1. Petitioner's principal contention is that by receiving in evidence the affidavits of five witnesses who were not present at the hearing, the Board of Inquiry deprived petitioner of the fair hearing required by 10 U.S.C. 8792(b). In construing that statutory standard, the court of appeals properly recognized (Pet. App. 8–9) that the proceedings before the Board are administrative, not criminal, that the only sanction imposed on petitioner was an honorable discharge with retirement pay, and that the rigid protection of the hearsay rule has not been thought to be fully applicable to administrative proceedings.[2] It is also relevant, as the court of appeals recognized, that Congress did not give the Board power to compel the presence of witnesses who are retired, inactive or discharged from military service. Against this background the court below properly concluded that it would not violate the statutory requirement of fairness for the Board to receive the affidavit of one not subject to subpoena.

Furthermore, in assessing the fairness of the proceedings, the court of appeals found that here, unlike *Greene* v. *McElroy*, 360 U.S. 474, petitioner "had

[2] See *Vitarelli* v. *Seaton*, 359 U.S. 535, 540; *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 44; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705–706. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886. Even in criminal proceedings exceptions to the hearsay rule are well known, under which statements of witnesses are admissible where no opportunity for cross-examination exists. See, *e.g.*, *Krulewitch* v. *United States*, 336 U.S. 440, 443–444 (out-of-court statement of co-conspirator); *Donnelly* v. *United States*, 228 U.S. 243, 273 (declaration against interest); *Mattox* v. *United States*, 146 U.S. 140, 151 (dying declaration).

procedural rights * * * which he knowingly failed to employ" (Pet. App. 9). Petitioner was given copies of the five affidavits well in advance of the hearings. When the four affiants whom petitioner wished to cross-examine declined to come to the hearing, petitioner never attempted to determine whether they would assent to having their depositions taken at locations convenient to them.[3] Petitioner now urges that it would have been futile to seek to take depositions (Pet. 20) and that it is "highly improbable" that the affiants would have agreed (Pet. 21). This is sheer speculation. Moreover, although the fifth affiant was still in the Air Force and could have been required to attend the hearing before the Board, petitioner never requested his presence. Under these circumstances, the court of appeals was plainly correct in concluding that petitioner failed to avail himself of "[i]mportant additional procedures for seeking a form of cross-examination of all five persons whose statements are the subject of this dispute" (Pet. App. 10).

2. Petitioner claims that the Air Force did not observe its own regulations (Pet. 21). Although the regulations gave petitioner the right to "question any witness *brought before* the board of inquiry,"[4] this would not seem to forbid the use of a statement of a person who cannot be brought before the board. On the contrary, the regulations explicitly encourage the "use of affidavits * * * to obtain testimony of wit-

[3] Two of the affiants lived in California, one in Texas and one in Wisconsin (J.A. 116).

[4] A.F.R. 36-2, § 17(d) (Pet. App. 14). (Emphasis added.)

nesses who are not reasonably available * * *."[5] Although the Air Force clearly stood ready to assist, petitioner did not request the presence of the one witness the Air Force could have compelled to attend and did not request the assistance of the Air Force in obtaining affidavits or depositions from the other four witnesses. We see no reason to doubt that the court of appeals rightly held that the Air Force Regulations were "followed explicitly" by the Board of Inquiry (Pet. App. 7).

3. Finally, there is no merit in petitioner's contention that, in reversing the district court, the court of appeals failed to heed the "clearly erroneous" standard of Rule 52(a), F.R.Civ. P. The rule is addressed to findings of fact in "actions tried upon the facts without a jury" and is inapplicable where, as here, the trial court disposes of the case upon motion for summary judgment. The district court did not make findings of fact; petitioner's motion for summary judgment was granted on the basis of stipulated facts, and in accordance with the district court's interpretation of the statute involved. We do not know of any case holding that a district judge's interpretation of a federal statute cannot be set aside unless clearly erroneous.

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[5] *Id.*, § 18 (c) (2) (Pet. App. 15).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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